


**FW: Important Question - is a Flat in the R-2 a Nonconforming Use? 1934 35th Place Follow up - maybe this is not an expansion of a NC use**

Martin Sullivan <msullivan@sullivanbarros.com>

Sun 3/12/2023 10:40 AM

To: Ndaw, Mamadou (DCRA) <mamadou.ndaw@dc.gov>; DOBCS (DOB) <dobcs@dc.gov>

Cc: Stephen Cochran - AICP (stephen.cochran@dc.gov) <stephen.cochran@dc.gov>; Alexandra Wilson <awilson@sullivanbarros.com>

 2 attachments (1 MB)

Signed Determination Letter - 1500 Ogden.pdf; Email OP and MPS.pdf;

Hi Mamadou,  
I forgot one attachment. Now attached.

The more I think about this, the more I think this makes perfect sense.

The proposal is to expand the *conforming* portion of the building, and to NOT expand at all the *nonconforming* portion of the building. If this were a mix of commercial and residential use, everyone agrees that the conforming residential portion may be expanded while the nonconforming residential portion is restricted. This is in accordance with the language of C-204.2 “Where the nonconforming use occupies only a portion of the structure, the restrictions in this section shall apply only to that part of the structure devoted to the nonconforming use.”

I think the mixed-use analysis is the same analysis in the situation where the nonconforming portion is residential as well as the conforming portion being residential. The conforming portion (one unit) should be expandable while the nonconforming portion (2<sup>nd</sup> PDU) is NOT. Under the current presumed analysis (that any expansion of any part of this building is an expansion of a nonconforming use), the use is being perceived as the same use. If it's the same use, then how can it also be nonconforming. This is the conundrum that led to the determination in the BZA case that I sent in the previous thread, and the ongoing confusion about whether or not a single and a flat are two different uses. The answer is: They are the same use, both residential, but one of those units is legally nonconforming, and as such may not be expanded. Seems to tie it all together nicely.

Finally, equitably and practically, a homeowner that has a legally nonconforming second unit is not restricted from expanding their first PDU, as long as their nonconforming second PDU is never expanded. This also disincentivizes an owner from asking for relief to expand the nonconforming 2<sup>nd</sup> unit, while still allowing them to have the right to expand their home in the conforming portion. It seems to fit with the entire purpose and intent of nonconforming use law. As it stands, the only option of the homeowner is to denounce and forfeit its right to have the nonconforming unit, if it wants to expand the conforming unit. That doesn't seem fair, and it doesn't fit the intent of nonconforming use law that says one should be able to keep the right to use and maintain the nonconforming portion of a structure.

Happy to discuss if you want to go over this.

Thank you in advance for considering!

Regards,  
Marty Sullivan  
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Board of Zoning Adjustment  
District of Columbia  
CASE NO. 20067  
EXHIBIT NO. 36A

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**From:** Martin Sullivan

**Sent:** Friday, March 10, 2023 2:26 PM

**To:** DOBCS (DOB) <dobcs@dc.gov>; Ndaw, Mamadou (DCRA) <mamadou.ndaw@dc.gov>

**Cc:** Alexandra Wilson <awilson@sullivanbarros.com>; Stephen Cochran - AICP (stephen.cochran@dc.gov) <stephen.cochran@dc.gov>

**Subject:** FW: Important Question - is a Flat in the R-2 a Nonconforming Use? 1934 35th Place Follow up - maybe this is not an expansion of a NC use

Hi Mamadou,

Thanks again for the answer below. I have a different question on the same topic.

Acknowledging now per your determination that this is nonconforming use, for a building in a single-family zone with two principal dwelling units, do you think that we can follow the nonconforming use regulations in a way that allows us to expand *one* of the *two* residential dwelling units and thereby not expanding the portion of the building that contains the nonconforming use.

The applicable Regs [added emphasis]:

C-204.1 A nonconforming use of land or structure shall not be extended in land area, gross floor area, or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment of this title.

C-204.2 Where the nonconforming use occupies only a portion of the structure, the restrictions in this section shall apply only to that part of the structure devoted to the nonconforming use.

Note that the language above applies to the “nonconforming use” of land or structure, and not necessarily to the entire building in which the nonconforming use exists.

In the case we’re working on now, the proposal is to expand one principal dwelling unit, while the second PDU (the nonconforming one) will not be expanded at all. In this case, I think it is reasonable to determine that the nonconforming use is not being *expanded in land area, GFA, or use intensity*; and that the expansion is limited to the conforming portion of the property. Do you agree?

There is precedent for this in a mixed-use case. In cases where there is a non-conforming retail store under a residential use, one may expand such a building, as long as they are only expanding the conforming residential portion of the building, and not expanding the nonconforming retail part of the building. I think perhaps the analysis should be the same for the expansion of a two-unit residential building, where one unit is conforming, and the second unit is not. Expansion of the first (conforming) unit could be permissible, while the expansion of the second (nonconforming) unit is not permissible, as long as one of the units is not expanded at all, either internally or by any addition.

The mixed-use scenario above is pretty common, I think; but the attached letter is one instance I know of for sure, where Mr. LeGrant approved expansion of a third story and adding a second residential dwelling unit above an existing commercial nonconforming use (and the permit was issued and this was built). I don’t know why I didn’t think of this before, but I think it’s in line with my reasoning in our case here, and hopefully this homeowner can expand her main unit as long as she doesn’t expand the second unit in any way (assuming all development standard Regs are met, of course). I think this would satisfy the language in the Regs, as well as the purpose and intent of the Regulations in restricting the expansion of a nonconforming use within a building or property (while allowing expansions of the existing conforming use).

We have a hearing for this Wednesday, and your input would be greatly appreciated! We would still need relief for some development standards, but not for the expansion of a nonconforming use. We’ve been working with

Steve Cochran on this and I mentioned the idea to him as well – attached email.

Thank you!

Regards,  
Marty Sullivan  
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